No. 14,389

IN THE

United States Court of Appeals

For the Ninth Circuit

TRIPLE "A" MACHINE SHOP, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S CLOSING BRIEF.

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In its reply brief, Respondent has followed the course of ignoring that which cannot be answered. In Libelant's Opening Brief, the following reversible errors are specified, which Respondent cannot and has not even attempted to answer, namely:

1. That the Trial Court was guilty of reversible error in making Findings of Fact that:

a. Omit essential material facts established by the evidence and the Pre-Trial Order.

b. Set forth "facts" that are directly contrary to the uncontradicted evidence.

c. Set forth conclusions of law as "facts".

(NOTE): All emphasis has been added.

2. That the trial court was guilty of reversible error in making Conclusions of Law, which are:

a. Contrary to law.

b. Based upon unsupported and erroneous findings of fact.

3. That the Trial Court was guilty of reversible error in:

a. Denying Libelant's motion to amend the Findings of Fact and Conclusions of Law.

b. Denying Libelant's motion for new trial.

4. That the Trial Court was guilty of reversible error in:

a. Making conclusions of law which are at variance with its order for judgment.

b. Making two "Final Decrees," each of which was at variance with the other, or at variance with the Court's Conclusions of Law, or the order for judgment.

The said errors are serious and material. Respondent has wholly failed to justify or explain away any of said judicial errors. We respectfully submit that, without going any further, the judgment of the Trial Court should be reversed on these grounds alone.

Respondent's brief deals solely with two other specifications of error, namely:

1. That the Trial Court was in error in ruling that the extra work here in question was covered by Libelant's bid.

2. That the determination of the Administrative Appeal Board was final and conclusive on the parties and the Court.

In its brief, Respondent prefaces a discussion of the said points by a "Statement." In its said "statement," Respondent sets forth as facts gross misstatements of the facts as established by the uncontradicted evidence. In support of the said erroneous statements of fact, Respondent makes reference to the transcript. It will be noted, however, that the references are to the Findings of Fact and not to the testimony or the Agreed Facts contained in the Pre-Trial Order.

Inasmuch as Respondent's brief and argument are premised upon numerous erroneous statements of fact, at least a few of said errors should be pointed out specifically by way of example. For instance, on page 3, Respondent states that Libelant's agent "made a thorough inspection of the five lifeboats as to their condition and need of repair." In support of said statement, Respondent refers to page 97 of the transcript. In other words, the said statement is taken as a direct quote from the Trial Court's erroneous Finding No. VI.

But a reference to the transcript of the testimony establishes without conflict or contradiction that Libelant's said agent inspected the lifeboats only as to the items specified in its bid, namely *Category A Items* (Rep. Tr. p. 128). It was not until the steel floors, metal tanks, etc. had been removed that anyone knew or could have ascertained what, if any, extra work would be required.

Likewise, Respondent states as a fact that Libelant's bid "was submitted on the basis of computations as to work necessary and cost thereof." In support thereof, Respondent refers to the Trial Court's erroneous and unsupported Finding No. VII. The evidence as established by the uncontradicted testimony is quite to the contrary (Tr. p. 170). In figuring the job, Libelant's agent computed only the cost of furnishing the *Category A Items* specified in its bid. And, up to this date, no one has claimed that Libelant's bid of $3,775.00 was not a very reasonable charge for furnishing said *Category A Items.*

On page 20 of its brief, Respondent comments on Libelant's contention that the extra work could not have been included in its bid by reason of the fact that the subsequently discovered defects could not have been detected until after the boats had been dismantled. To answer this, Respondent states: "On the basis of all evidence adduced at the trial, the trial court found that such items of repair were subject to inspection and ascertainment by libelant's representative prior to submission of the bid." Page 99 of the transcript, viz.—the Court's erroneous Finding No. XI, is cited in support of the above quoted statement. The Court's said finding is even more shocking and at variance with the uncontradicted evidence than is the said quoted statement. In its said Finding, the Court states: "That all such items of repair were visible and subject to inspection. . . ."

There is not one word in the record to support such a finding. To the contrary, the evidence estab-

lished, without conflict, that of the $6,000.00 worth of extra repairs, all but a few trifling items, such as the lifelines and two thwarts, could not be seen until the boats were completely dismantled (Rep. Tr. p. 129, 149).

It would seem obvious that erroneous and unsupported Findings cannot be used to support Respondent's argument. A direct reference to the testimony and the Agreed Facts in the Pre-Trial Order will establish that Respondent's statement of facts contains ~~may~~ many serious and material misstatements of facts.

We turn now to a consideration of the first point dealt with in Respondent's argument, namely, that Libelant was obligated under its contract to furnish the extras herein question without compensation therefor. In dealing with Respondent's said contention, we will endeavor to avoid a repetition of the points, authorities, and arguments set forth in Libelant's opening brief.

Respondent's argument in support of its said contention consists of repeating over and over again that the specifications state that it is intended that the lifeboats shall be put in proper condition before being returned to service. If the government had any other intention, it would be most shocking.

As is pointed out in Libelant's Opening Brief, the terms of the contract between the parties are established by the terms of Libelant's offer. The said offer

expressly incorporates a part, and only a part, of the specifications, namely, the *Category A Items.* Witnesses for both sides testified without conflict that Libelant's said bid was accepted by Respondent exactly as it was made. Neither Respondent nor the Trial Court has the power to read into that contract any provisions that are not expressly contained in the offer.

The said expressions of intent contained in the opening paragraphs of the specifications have no significance insofar as Libelant's contractual obligation is concerned. But, for the sake of argument only and for the purpose of exploding Respondent's said contention, we will briefly pursue Respondent's contention just as if Libelant had not expressly limited its bid to the portion of said specifications designated as *Category A Items.*

Even if we start with the false assumption that Libelant incorporated all of said specifications in its bid, where does that take us?—Absolutely nowhere! No amount of reading or study of the specifications will disclose one word which states or implies that subsequently discovered defects in the lifeboats will have to be repaired gratuitously by the contractor. The most that can be said is that the intent expressed in the preamble of the specifications puts the bidders on notice that the contractor may be required to furnish extra work. It certainly does not state that the contractor will have to furnish any additional repairs for free.

Legally, the said expression of intent adds nothing to the contractual duty of the successful bidder. Under the Master Contract, the bidder had already agreed that it could be required to furnish all extra repairs found necessary during the job, and that the contractor could not hold up the furnishing of said extras pending agreement as to the reasonable value thereof.

It would seem obvious that a ship repair job, as listed in *Category A* of the specifications and which was of the value of $3,775.00, would be a trivial fill-in job in the field of marineship repair. Since the Master Contract established that the contractor could be required to furnish extras, the only conceivable purpose of setting forth the said intention in the preamble of the specifications was to put all bidders on notice. If they expected to bid on this small job as a fill-in, they should be on notice that there might be extras, and they might have to pull workmen off other jobs to complete the extras; that if they would not have available men and materials to furnish any extra repairs that might be found necessary, then they should not bid.

What other reason could there be for notifying the contractors that extra work might be required? If it had been intended that the successful bidder would be required to furnish unknown extras without compensation, the specifications should and would have so stated. Of course, in such event, there would have been no bidders.

After dealing with said expressions of intent set forth in the specifications, Respondent points with

emphasis to the facts that the preamble of the specifications also states that "the work shall include, but shall not be limited to any detailed specifications which follow." But what does this prove? Certainly, it cannot be claimed that the said provision either states or implies that any additional work shall be furnished gratuitously. At best, this is merely a re-statement of the legal obligation under the terms of the Master Contract. The said provision merely constitutes a further notice to the bidders that they should not put in a bid if their plant facilities can only take care of furnishing the known repairs listed as *Category A Items.*

Next, Respondent stresses the fact that the preamble of the specifications states that "all work shall be subject to the inspection and approval of the U. S. Coast Guard and U. S. Inspector assigned." We fail to see any relevancy. All government ship repair work has to pass inspection whether the contract so states or not. In this case, all work furnished by Libelant, both *Category A Items* and extras, were so inspected and approved. The said quoted provision does not state or infer that if said inspector discovers additional defects in the lifeboats, the contractor can be required to furnish the same gratuitously or within the contract price. As a matter of fact, the said provision only authorizes the inspection of "all work." It does not state that an inspection shall be made of the boats during the course of the job to see if any other repairs are necessary. The right to make such inspection exists exclusive of anything in

the specifications. The boats are government owned and may be inspected at any time by government inspectors. Under the Master Contract, and not under the said provisions of the specifications, the contractor can be required to furnish all additional repairs found necessary.

Not only do the said provisions of the specifications give no support to Respondent's contention, but as is set forth in Libelant's opening brief, the said provisions form no part of Libelant's bid or contract. No matter how Respondent may seek to strain or distort the contract, it is simply an offer to furnish certain specified items at a definite price. The said offer could not be more simply or clearly stated (Ex. H, Tr. p. 58).

> "Triple A Machine Shop, Inc. . . . offers and agrees, if this bid is accepted . . . to furnish any and all items of supplies or services *described on the reverse side of this bid at the price set opposite each item.*"

And, of course, there was only one item on the reverse side, namely:

> "Category A Items"
> "Total Price $3775.00."

Respondent was under no obligation to accept said offer. But it did accept the offer without question or modification. Libelant's said offer to furnish *Category A Items* for $3,775.00 constituted the extent of its obligation under the contract. Under the previously executed Master Contract, Libelant was, of

course, contractually bound to furnish all extras found necessary during the job. But, under said Master Contract, Libelant was entitled to payment of the reasonable value of said extras.

Respondent's brief appears to recognize that the language of the specifications cannot be tortured into holding that the successful bidder will be required to gratuitously furnish the labor and materials required to repair all subsequently discovered defects. Respondent, therefore, shifts to a different position.

In this connection, Respondent seeks to set up a new contract for the parties, namely, the Job Order. This, Respondent states, "constituted a counter-offer to pay $3,775.00 for the performance of the work set forth in the entire attached specifications." However, there were no specifications attached to the job order! But, for purposes of this argument, we will assume that the specifications were attached, and that they were the identical specifications here in question. It will be noted, however, that in the above quoted statement, Respondent added the word "entire" to the text. The said job order provides as follows:

(Tr. p. 34)

> "1. Work: The Contractor shall furnish the supplies and services required to perform the work described in the attached plans and specifications made a part hereof and designated as follows: Repairs to Five (5) Lifeboats, Specifications No. MSTSP 51-64."

Respondent then states (p. 3), "This job order was accepted by Libelant under date of October 11,

1950. *Thereafter* Triple 'A' entered upon the performance of the work pursuant to the Master Contract, the specifications and the job order." But what are the facts? The record does not disclose, but it may be properly assumed, that Libelant followed the universal practice of contractors, and had its representative present at the opening of the bids on October 2, 1950. The record definitely establishes that Libelant's bid was accepted by Respondent on October 2, 1950. This is affirmatively established by the Agreed Facts of the Pre-Trial Order (Tr. p. 69). It is likewise admitted on page 3 of Respondent's brief, viz. "On October 2, 1950, MSTSP accepted the bid of Triple 'A' . . ." The Invitation to Bid (Ex. 3, Tr. p. 51) gives the starting time for the job:

> "3. Work is to commence:
> On award of job, on or about 2 October 1950."

So the bids were opened and Libelant's bid was accepted on October 2, 1950. Libelant moved the boats into its yard and immediately started work. There was no waiting for the job order, which did not arrive until October 11, 1950. In order to try to strain out from under the obligation of the contract which came into being on October 2, 1950, Respondent states that Libelant signed the job order on October 11, 1950, and "*thereafter* Triple 'A' entered upon performance of the work . . ." This, of course, is contrary to the fact, and there is nothing in the record to support such a statement.

As soon as its bid was accepted, Libelant started with the job, but the administrative machinery of the government does not move so rapidly. Often the job orders do not come through until weeks or months after the job has started (Tr. p. 172). To say that a belated job order constitutes a new contract or a counter-offer for a job that is under way under an accepted offer is absurd. If it were ever considered that such a transaction could constitute a new contract, it would then fall of its own weight. Libelant's offer to furnish specific items for $3,775.00 had been accepted, and the job was in progress. What, then, constituted the consideration for the new alleged obligation to furnish over $6,000.00 worth of additional items without compensation therefor?

Respondent's contention is based upon a further false assumption. Respondent assumes and states as a fact that the belated job order called for the furnishing of the extra work here in question without compensation therefor. This assumption is so seriously false and without foundation that it requires special comment.

As quoted above, the pertinent provisions of said job order provide that "the contractor shall furnish the supplies and services required to perform the *work described* in the attached plans and specifications" (no plans or specifications were attached). The question then arises as to what work is "*described*" in the specifications. Assuming that the specifications were attached to the job order, what do they show as to the "*work described*"? Clearly and without

question, the only *"work described"* in the specifications is the work listed and described under the heading *"Category A Items."*

There is no room for doubt or debate as to the meaning of *"work described."* Webster's definition of "describe" is:

> "To depict or portray in words;
>
> To give a clear and vivid exhibition in language."

If a copy of the specifications had been attached to the job order, wherein could one find a clear or vivid portrayal of a single item of the extra work here in question? The said extra work could not have been "described" in the specifications or elsewhere. The government planner who drew the specifications did not know or have any means of knowing whether any extra work would be required. The said extra work could not have been "described" by anyone until after the contract had been let and the boats had been completely dismantled.

If the job order has any legal significance as a contract, counter-offer, or otherwise, this could only arise out of the Master Contract. In fact, Respondent's brief clearly states that the job order is required by the Master Contract. Let us then see what the Master Contract states in reference to job orders.

(Ex. A, Cl. Tr. p. 25)

> "(a) Upon the issuance of a job order, the Contractor shall promptly commence the *'work specified'* therein and in any plans and specifications made a part thereof . . ."

It would seem that the meaning of "specified" is as clear and well understood as is the word "described." No work is "specified" in the job order, so let us assume that a copy of the specifications had been attached thereto. Could it then be said that a single item of the *extra* repair work was "specified" therein?

But, before proceeding further, let us definitely determine the meaning of the word "specified" as used in said Master Contract. Fortunately, on numerous occasions, the courts have been called upon to define and adjudicate the meaning of the word "specified." The decisions have been uniform in this regard. A number of said decisions have been compiled in the 1953 edition of "Words and Phrases." We quote a few.

Vol. 39B—Permanent Edition (1953):
"SPECIFIED"

"The word 'specified' as used in statute providing that a contract is an agreement between two or more parties for the doing or not doing of some 'specified' thing means mentioned or named in a specific or explicit manner or told or stated precisely or in detail. *Gray v. Aiken,* 54 S.E. 2d 587, 589, 205 Ga. 649."

"The word 'specified' has a clearly defined meaning. In the transitive it means to mention or name in a specific or explicit manner, to tell or state precisely or in detail; as to specify articles; whereas, in the intransitive it means to specify precisely or in detail, to give full particulars. *Duke Power Co. v. Essex County Board of Taxation,* 7 A. 2d 409."

> "The word 'specified' means to mention or name in a specific or explicit manner; to tell or state precisely or in detail. *Aleksich v. Industrial Accident Fund,* 151 P. 2d 1016."

How, then, can Respondent contend that the items of extra work are "*specified*" in the Specifications? It is obvious, of course, that it was impossible to "specify" said extra work in the Specifications. At the time the Specifications were prepared, no one knew or could have known whether these or any other items of extra work would subsequently be found necessary. A generalized statement of purpose to make all repairs that may be necessary to put the boats in proper condition is a far cry from proof that the admitted items of extra work are "specified" in the job order or Specifications. A mere recital that it subsequently may be found necessary to make repairs in addition to the repairs that are listed in *Category A* of the Specifications obviously does not support a contention that the indefinite and, in fact, unknown repairs are "specified" in the Specifications or Job Order.

The most that can be said of the belated job order is that it confirmed the contract entered into between the parties on October 2, 1950, under which Libelant was required to furnish the "work specified," namely, the *Category A Items,* for $3,775.00.

The remainder of Respondent's brief deals with the force and effect of the decision of Respondent's

administrative appeal board. We believe that this question has been rather thoroughly covered in Libelant's Opening Brief and that Respondent has wholly failed to answer the same. By reason of the seriousness of the question, we will briefly deal with Respondent's contention and will endeavor to avoid repetition of the points and authorities set forth in our opening brief.

The problem seems quite simple. At the time that Libelant signed said Master Contract, there was little legal or judicial restraint placed upon a party for contracting away his right to judicial review and redress in Court. The Master Contract had no expressed period of duration, and we assume that the same will be effective until revoked by the parties. We seriously doubt that one branch of the government can make a contract requiring the other party to forego its right to a day in court and project the same into the future, thereby making the same immune from laws subsequently passed by Congress. In other words, we believe that the Act of May 11, 1954, 68 Stat. 81, would apply to this case if we were here dealing with a decision made by an administrative appeal board under Art. 14 of said Master Contract.

But the decision here in question was not made under Art. 14. To the contrary, the administrative appeal board clearly and expressly made its decision under Art. 5(j) of the Master Contract.

The two provisions deal with different subjects and set up entirely different appellate proceedings, and

provide for different effectiveness of decisions on appeals under said sections.

1. Article 14 expressly excludes consideration of matters to be determined under Art. 5(j).

2. Under Art. 14, an appeal from the decision of the government's local contracting officer is to be referred to the Commander, Military Sea Transportation Service. The section then provides for a further appeal to the Secretary of the Navy. And, lastly and most important, the section expressly provides that the administrative decision on appeal shall be "final and conclusive."

3. Art. 5(j), with which we are here concerned, sets up an entirely different procedure for dealing with different subject matter, namely, controversies arising out of plans and specifications. It provides that a contractor may appeal to the Commander, M.S.T.S., for a decision of the local contracting officer. No provision is made for appealing to the Secretary of the Navy from the decision of the Commander of M.S.T.S.; and it is not specified or inferred that the Commander's decision shall be final or conclusive.

Respondent concedes that this controversy was properly a subject for appeal under Art. 5 and not under Art. 14. That ends the matter, unless Respondent is seriously contending that the Trial Court has the power to make a new contract for the parties.

There is no ambiguity in Art. 5(j) and, hence, there is no basis for judicial construction, which would add

a whole sentence to Art. 5(j) and deprive Libelant of its legal and constitutional right to judicial review and redress in Court. Even if the Act of May 11, 1954 should be held to be inapplicable to this case, it does establish that the people who go to make up this nation are opposed to their government denying the right of judicial review to those who deal with the government.

As is pointed out in Libelant's Opening Brief, the Courts hold that the right "to resort to the Courts . . . will not be denied unless the contract makes such conclusions inescapable."

It is therefore respectfully urged that the judgment of the Trial Court be reversed, with direction for judgment in favor of Libelant for the reasonable value of said extras, namely $6,040.00.

Dated, San Francisco, California,
March 31, 1955.

Respectfully submitted,
J. THADDEUS CLINE,
Proctor for Libelant.